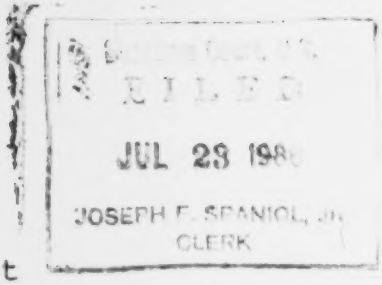
86-122

CASE NO.



IN THE

Supreme Court

OF THE

United States of America

October Term, 1986

ROBERT M. THOMPSON, Appellant
v.
JOAN E. THOMPSON, Appellee.

On Appeal From
THE SUPREME COURT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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Attorneys for Appellant

Pursuant to Rules 12.3 and 15 of the

Rules of the Supreme Court of the United States, appellant , Robert m. Thompson,files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment entered by the California Supreme Court in this case and should exercise such jurisdiction herein.

QUESTIONS PRESENTED

1. Does California Civil Code Section 5124, which allows the retroactive modification of an award of military retirement benefits contained in a final, stipulated judgment of dissolution of marriage, amount to an impairment of contract in violation of Article I, Section 10 of the United States Constitution?

2. Does California Civil Code Section 5124, which authorizes the California courts to make retroactive modifications of final judgements of dissolution of marriage and to

divest, for the benefit of one party, military retirement benefits previously awarded to the other party pursuant to such final judgment, amount to a denial of Due Process under the Fifth Amendment to the United States Constitution?

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OPINION BELOW

The California Supreme Court denied a Petition for Hearing after the California Court of Appeal held that California Civil Code Section 5124 as applied herein did not violate the Due Process Clause contained in the Fifth Amendment to the United States Constitution. Although properly raised on appeal, both the California Supreme Court and the Court of Appeal did not discuss or rule on the issue raised by Appellant that the application of California Civil Code Section 5124 herein was an unconstitutional impairment of contract under Article I, Section 10,

of the United States Constitution. The decision of the Court of Appeal was to affirm the trial court's ruling to modify the prior final judgment and to reallocate the military retirement benfits, previously awarded to the Appellant, to the Appellee.

JURISDICTION

The Appeal herein is from a final judgment made and entered in the California Supreme Court denying Appellants Petition for Review and affirming the decision of the California Court of Appeal. The Court of Appeal had affirmed the decision of the trial court to allow military retirement benefits previously awarded to the Appellant as his sole and separate property in connection with a dissolution of marriage action to be reallocated and awarded to the Appellee. This reallocation was authorized and approved by the court despite the fact that the judgment of dissolution of marriage awarding

these benefits to the Appellant had become final and conclusive as to the parties.

The decision of the Court of Appeal was rendered on December 23, 1985. Appellant filed a Petition for Rehearing in that Court on January 7, 1986. The Petition for Rehearing was denied by the Court of Appeal on January 22, 1986. Appellant filed his Petition for Review in the California Supreme Court on February 3, 1986. On March 12, 1986 the California Supreme Court denied Appellant's Petition for Review. On June 10, 1986 Appellant filed his Notice of Appeal to this Court with the California Supreme Court and the California Court of Appeal (a copy of which notice is set out in Appendix "D" hereto).

The Supreme Court of the United States has jurisdiction to review the final judgment by direct appeal pursuant to 28 USC Section 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I Section 10 of the United States Constitution states:

"Section 10. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit;make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

"No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any State on imports and exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision

and control of the Congress.

"No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in imminent danger as will not admit of delay"

Amendment V of the United States Constitution states:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or

property, without due process of law; nor shall private property be taken for public use, without just compensation."

California Civil Code Section 5124 states:

"(a) Community property settlements, judgments, or decrees that become final on or after June 25, 1981, and before February 1, 1983, may be modified to include a division of military retirement benefits payable on or after February 1, 1983, in a manner consistent with federal law and the law of this state as it existed before June 26, 1981, and as it has existed since February 1, 1983.

"(b) Modification of community property settlements, judgments, or decree under this section may be granted whether or not the property settlement, judgment, or decree expressly reserved the pension issue for further determination, omitted any reference to a military pension, or assumed in any

manner, implicitly or otherwise, that a pension divisible as community property before June 25, 1981, and on or after February 1, 1983,was not, as of the date of the property settlement, judgment, or decree became final, divisible community property.

"(c) Any proceeding brought pursuant to this section shall be brought before January 1, 1986.

"(d) This section shall remain in effect only until January 1, 1986, and on that date is repealed unless a later enacted statute which is chaptered before that date deletes or extends that date"

STATEMENT OF THE CASE

The parties hereto were married on December 25, 1955 and seperated January 5, 1981. During the marriage Appellant was a member of the United States Air Force and as such became entitled to a benefit payment

upon his retirement. The parties were able to resolve their differences and filed with the dissolution trial court a document entitled "Appearance, Stipulation and Waivers" wherein they indicated their agreement that, among other things, they were both waiving their rights to notice of trial, findings of fact, conclusions of law, motions for new trial and the right to appeal. The parties further agreed that a stipulation for judgment would be prepared, submitted to the Court at an uncontested proceeding and that none of the stipulations or waivers would apply unless the Court approved in its entirety the written settlement agreement or stipulation for judgment to be submitted. An interlocutory judgment of dissolution of marriage was granted and entered in complete conformity with the stipulation for judgment submitted by the parties. The decree was prepared by Appellee's attorney and was expressly approved as to form and content by both parties and their

attorneys. By the terms of that judgment it was ordered that Appellant be awarded, as his sole and separate property, his military retirement benefits. The Court reserved jurisdiction over the parties and the division of assets for the limited purpose of insuring compliance with the terms of the judgment. At the express request of Appellee and her attorney, a Final Judgment of Dissolution of Marriage was entered. No appeal was ever taken from the interlocutory or final decree.

Approximately eighteen months later, Appellee filed a motion requesting the Court modify the Interlocutory and Final Judgment of Dissolution of Marriage and to award her a portion of the military retirement benefit awarded to Appellant in the Judgment of Dissolution. The trial court heard and granted that motion.

Appellant timely filed his appeal from

the trial Court's decision. While that appeal was pending, the California Legislature enacted Civil Code Section 5124. The issue of the applicability of this code section and the extent to which it violated Constitutional prohibitions against the impairment of contract and denial of due process were not, therefore, raised until briefs were submitted in the California Court of Appeal. At that time the Court first considered and held that the code section not only applied to this case but further that there was no violation of due process principles. Although the issue of the unconstitutional impairment of contract as a result of the application of Civil Code Section 5124 was raised at the Court of Appeal, the Court did not address nor rule on that issue in its written opinion. Because of this failure a Petition for Rehearing was made to the Court of Appeals which was denied without further comment. The California Supreme Court denied

without comment Appellant's Petition for Review. Appeal to this Court followed.

FEDERAL QUESTIONS ARE SUBSTANTIAL

I

The decision of the California Court of Appeal and the California Supreme Court to allow the State, by retroactive legislation to take away rights that have been once vested by a judgment without engaging in a "subtle balancing" of factors is a significant departure from concepts of due process that have been developed by this and other Courts.

In McCullough v. Virginia, 172 U.S. 102, 123 this Court stated:

"[i]t is not within the power of a legislature to take away rights which have been once vested by a judgment." For "[l]egislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into

judgments, the power of the legislature to disturb the rights created thereby ceases.

It is conceded that not every retroactive legislation is violative of the Due Process Clause. In determining whether a retroactive law contravenes the Due Process Clause there are at least six factors which the Court must consider:

1. The significance of the State interest served by the law

2. The importance of the retroactive application ofthe law to the effectuation of that interest.

3. The extent of the reliance upon the former law.

4. The legitimacy of that reliance.

5. The extent of the action taken on the basis of that reliance, and

6. The extent to which the retroactive application of the new law would disrupt those actions. (In re Marriage of Bouquet

16 Cal.3d 583)

The California Courts felt it was unnecessary to engage in the "subtle balancing" of these factors because of the State's "paramount interest in the equitable distribution of marital property". However, the State courts totally disregarded a long line of cases dealing with res judicata, principles and their application in marriage and family law cases. In In Re Marriage of Sheldon, 124 Cal.App.3d 371, the California Court of Appeal set out at length the strong State interest in finality and stability in the area of marriage and family law. Under principles set forth therein, there is no other area in which retroactive application of the law is more disfavored then in marriage and family law cases. Even assuming that the State's interest in the equitable distribution of marital property outweighed the State's interest in finality and stability in marriage and family law, the

retroactive application of Civil Code Section 5124 applies only to those few cases where the Court awarded military retirement benefits to a service member and the service member's spouse allowed such judgment to become final without appeal. In those situations the parties clearly relied on former law (McCarty v. McCarty 453 U.S. 210), factor cited as weighing against retroactive application. Further, reliance on a decision of the Supreme Court of the United States is totally justified. As the highest and ultimate tribunal in the country, its decisions and pronouncements are rarely subject to further review. This justified reliance has been cited as a factor weighing against retroactive application. Additionally, it is clear that those persons to whom Civil Code Section 5124 was directed are those that acted in greatest reliance on the prior law. It is exactly the spouses

which chose to accept the benefits of the judgment and not appeal the decision of the Court that Civil Code Section 5124 is designed to benefit. Finally, the extent to which the parties actions and lives would be disrupted if Civil Code Section 5124 would be great. As the California Court of Appeal stated in In Re Marriage of Sheldon 124 Cal.App.3d 371, 383:

"To permit and in fact encourage the relitigation of property interests long after the issues were supposedly settled would merely serve to reopen old wounds and create new ones. There is no guarantee that the nonservice member spouse would have assets sufficient to reimburse the service member for that portion of the pension rights which had previously been an awarded share of community property. Substantial hardship would result in cases where the nonmember relied on the property settlement in converting his or her share into nonliquid

assets. Moreover a reallocation of property interests would likely constitute sufficient "changed circumstances" to trigger a second round of relitigation involving spousal support awards. We also note the immense burden on the administration of justice in our civil courts were such relitigation permitted."

It is respectfully submitted that the holdings of the California Courts are incorrect. That a subtle balance is required in this area and that when the factors cited are considered in conjunction with the analysis of In Re Marriage of Sheldon supra, the retroactive application of Civil Code Section 5124 will be found to be invalid, under the facts of this case, as a denial of due process of law. Unless this Court requires the Courts of the State of California to engage in analysis and balancing in the area of due process, there

will remain the risk that substantive property rights can be taken away or divested by the State Courts by the simple declaration that a "paramount state interest" is involved without further analysis or elaboration. Such is exactly the abuse that the due process clause of the United States Constitution was intended to prevent.

///

II

Civil Code Section 5124 provides that community property settlements, judgments or decrees can be retroactively modified to allow a reallocation of military benefits. Appellee cited this section as authority for the Court to affirm to her the reallocation of a significant portion of military retirement benefits previously awarded to Appellant. These benefits were awarded to Appellant as his sole and separate property pursuant to a stipulation for judgment which was expressly conditioned on the fact that

the Court would have to approve the written stipulation for judgment in its entirety. The written stipulation was signed by both parties and their respective counsel. The Court thereafter entered a judgment in complete confirmity with the stipulation.

A stipulation is an agreement between attorneys (and, in this case, between the parties, as signatories) relating to a matter involved in a judicial proceeding and entered into in the manner prescribed by law. Palmer v. Long Beach 33 Cal.2d 134,142. It is a contract supported by consideration and binding on the parties. First National Bank v. Standsbury 118 Cal.App. 80, 84. Further, an authorized stipulation is binding not only upon the parties but the Court as well. Estate of Howe, 88 Cal.App.2d 454. From the foregoing it follows that the particular agreement of the parties herein is clearly a contract and entitled to a protection given

by Article I, Section 10 of the United States Constitution.

In Home Building and Loan Association v. Blaisdell, 290 U.S. 398, the Supreme Court of the United States identified four factors which would be considered in determining whether a law amounted to an unconstitutional impairment of a contract.

1. Has the legislature declared an emergency as justification for the law and does that declaration have an adequate basis?

2. Is the legislation enacted for the advantage of particular individuals rather than for the protection of a basic interest of society?

3. Is the law appropriate to the emergency and are the conditions imposed reasonable?

4. Is the legislation temporary and limited to the exigency which provoked the legislative response?

Additionally, in Allied Structural Steel

Company v. Spannaus 438 U.S. 234, the Supreme Court held that where a statute accomplishes a severe impairment of contractual rights, the "height of the hurdle the State legislation must clear" is elevated and "a careful examination of...[its] nature and purpose" is required. (Allied Structural Steel Company, supra at 245.

Applying these standards to the facts of this case it is clearly evident that the impact of Civil Code Section 5124 is severe. Appellant has lost one half of his military retirement benefit as a result of the State Court's action. This portion of his benefits is substantial and amounts to a significant transfer of funds and property from Appellant to Appellee. These benefits were not postponed but were irretrievably lost. They were not surrendered by Appellant in exchange for a benefit to him but are taken with no offsetting consideration. There is a severe,

permanent and immediate change in Appellant's rights under his agreement with Appellee and it cannot be said that the measure taken was mild or light. Since the statute herein accomplishes a severe impairment of Appellant's rights, the height of the hurdle the State legislation must clear is elevated and a careful examination of its nature and purpose is required.

Applying the factors set forth by the United States Supreme Court, it is clear that the impairment of the agreement herein is unconstitutional. The Legislature has declared no emergency as justification for the enactment of Civil Code Section 5124. It was not an urgency statute, therefore, not only is there no basis for an emergency, the Legislature did not declare one. Secondly, the legislation was clearly enacted for the advantage of particular individuals, i.e., those spouses of uniformed service members who obtained a final decree of dissolution

during the period between June 25, 1981 and February 1, 1983 and who did not appeal an award of military retirement benefits to the uniformed service member. The California Legislature obviously intended to carve out a category of people whose cases happened to be decided between June 25, 1981 and February 1, 1983. Thirdly, as pointed out above, Civil Code Section 5124 is not "appropriate to the emergency" because there is no emergency and no legislative declaration of such. Finally, although Civil Code Section 5124 is temporary, (expiring by its own terms on January 1, 1986) it cannot be described as being limited to the exigency which provoked its passage since, again, there was no finding of urgency, nor did the Legislature feel that the circumstances addressed by Civil Code Section 5124 required immediate aid or action.

Finally, it must be pointed out that

although the issue of the unconstitutional impairment of contract was raised by Appellant before both the California Court of Appeal and California Supreme Court, neither Court considered or addressed the issue. Unless this Court grants review Appellant will not have had any hearing on this issue. Unless this Court grants review the Courts of this State will feel free to disregard substantial contractual rights without consideration of the parties' interests or the constitutional provisions against such a disregard.

CONCLUSION

The Court should take jurisdiction of this appeal.

JOHN W. NOONAN

Brian D. Seibel
62 West Neal St.,
Pleasanton, CA 94566

ORDER DENYING REVIEW
AFTER JUDGMENT BY
THE COURT OF APPEAL
1st District, Division 4, No. A023603
IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

IN RE MARRIAGE OF THOMPSON

THOMPSON
v.
THOMPSON

Appellant's petition for review DENIED.

SUPREME COURT
FILED
March 12, 1986
Lawrence P. Gill,
Clerk

BIRD
Chief Justice

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re the Marriage of
JOAN and ROBERT THOMPSON.

JOAN E. THOMPSON,

Respondent, No. A023603

v. (Alameda County
Sup.Ct. No.H-74044-A

ROBERT M. THOMPSON,

Appellant.

_____/

Robert M. Thompson ("husband"), a career officer in the United States Air Force and former husband of respondent Joan E. Thompson ("wife"), appeals from an order after judgment reallocating distribution of his future military retirement benefits as community property based on federal legislation designed to overrule the decision of the United States Supreme Court in McCarty v. McCarty (1981) 453 U.S. 210. Because of a procedural situation unique to family law and in the

interest of judicial economy, we affirm the order, holding that although the trial court was without authority to make the order at the time it was made, the Legislature subsequently enacted Civil Code section 5124[1], which now provides such authority.

I. The Facts

Husband and wife were married in 1955. In 1981 they were granted a dissolution of marriage. The division of their property was entered on a stipulated judgment from which no appeal was taken. Because of the McCarty decision in which the United States Supreme Court held that state courts had no power to divide military retirement pensions, the parties had stipulated that all of husband's military retirement pension rights would be allocated to husband as his sole and separate property. In fact, the judgment specifically references the McCarty decision as the basis for that portion of the judgment. The judgment also provided, pursuant

to stipulation, that certain real property of the parties located in Rescue, California, would be listed for sale with the proceeds to be equally divided between them. The judgment became final in 1981.

In November, 1982, husband, who was stationed outside California, returned to this state and requested that the court modify the judgment by (1) reducing his spousal support obligation and (2) providing (a) that he should receive credit since the time of the judgment against the proceeds from the sale of the Rescue property for his payments on a loan secured by the property and (b) that wife be ordered to make one-half of the future payment on the loan until the property was sold.

In addition to opposing husband's requested modification, on February 4, 1983, wife responded with a request of her own seeking modification of the judgment. In response to the outcry over the McCarty deci-

sion, Congress had passed the Uniformed Services Former Spouses Protection Act (Pub. Law No. 97-252, Section 1001 et seq., 96 Stat. 730 (Sept. 8, 1982); hereinafter "FUSFSPA")[2] granting state courts the authority to allocate military retirement pensions as community property which McCarty said they previously lacked. However, FUSFSPA did not take effect until February 1, 1983 (see In re Marriage of Hopkins (1983) 142 Cal.App.3d 350,355), months after the initial judgment in this case was entered. Nevertheless, like many former spouses, wife sought to modify the judgment in light of that new enactment on the ground that the only reason she had stipulated to husband receiving all of his future retirement benefits as his sold and separate property had been the McCarty decision.

Although husband objected to the personal jurisdiction of the court over him in his opposition papers, husband opposed wife's

request for modification of the judgment on the merits and failed to make a special appearance to preserve the personal jurisdiction objection in the trial court. After hearing, the court granted wife's request and reallocated a portion of husband's request for reconsideration, the request was denied and husband appealed.

In August, 1985, wife's counsel moved to advance this matter on our calendar, noting that section 5124,[3] which was enacted after the trial court entered its order in this case and which specifically granted trial courts authority to enter such orders for a limited period of time, expires January 1, 1986. Husband expressed his lack of opposition to the request for expedited consideration, and we granted the motion on September 25, 1985.

II. Husband's Contentions on Appeal

A. Jurisdiction

As a preliminary argument, husband apparently contends that the court had no personal jurisdiction over him permitting it to modify the judgment in the manner it did. We say apparently because, as wife notes in her responsive brief, it is not totally clear whether husband's objection to jurisdiction relates to personal or subject matter jurisdiction. In any event, husband argues that he never resubmitted to the jurisdiction of the California courts after the 1981 judgment of dissolution of marriage became final. He asserts that his own later request for modification of the judgment did not constitute a "resubmission" to the jurisdiction of the court because his request for modification was solely aimed at matters on which the court had retained jurisdiction. He apparently contends that the court's retention of jurisdiction on those matters was not suffi-

cient to retain personal jurisdiction over him on other subject matters relating to the judgment.

B. Reallocation of Military Retirement Benefits

Husband contends that, notwithstanding the passage of FUSFSPA, the trial court improperly entered its order modifying the final judgment and reallocating his future military retirement pension as community property. Although he asserts several alternative theories, including estoppel by contract, equitable estoppel and estoppel by judgment, his argument is essentially grounded in the doctrine of res judicata. Simply put, he argues that his stipulated judgment became final when wife failed to take an appeal from it. As a result, he contends that any later attempt to modify the judgment violates the principles of res judicata. As a fall-back argument, husband contends that any effort to find and apply an exception to

the res judicata bar would constitute a denial of due process.

III. Analysis

A. Jurisdiction

Husband appeared in the trial court and opposed wife's requested modification on the merits. That the failure to make a special appearance in order to preserve an objection to personal jurisdiction constitutes a waiver of any such objection is so well settled as to not require citation of authority. Accordingly, husband cannot now complain about lack of personal jurisdiction.

B. Reallocation of Military Pension Benefits

At the time that the trial court entered its order on May 27, 1983 modifying the judgment to reallocate the military retirement benefits as community property, it was without authority to do so. This is so even though the federal enactment of FUSFSPA had already become effective on February 1, 1983 because it applied only to cases that were

not final as of the date the legislation became effective. The judgment in our case had become final on August 28, 1981. The California Legislature's enactment of section 5124 giving the trial court authority to modify final judgments did not become effective until January 1, 1984. Thus, husband correctly contends that the doctrine of res judicata precluded the trial court from modifying the judgment which became final before section 5124 became effective. However, the Legislature had the power to overcome the res judicata bar and exercised that power when it enacted section 5124. (See Mueller v. Walker (1985) 167 Cal. App. 3d 600.) In addition, to apply section 5124 retroactively does not constitute a violation of due process. The Mueller court succinctly analyzed this issue in its decision and we adopt that reasoning here:

"In determining whether Civil Code section 5124 contravenes the due process clause,

we must consider inter alia the significance of the state interest served and the importance of retroactive application to effectuate that interest. [Citations.]

"We conclude the language of this section as well as its legislative history leave no doubt that any property divisions made in reliance upon the McCarty decision which became final before the effective date of FUSFSPA are susceptible to redivision as community property so long as action is taken before the scheduled repeal date. This law is a clear expression of legislative intent that recovery of a community property interest in a military pension benefit should not be barred simply because the case by chance falls into the 18-month gap between the effective dates of FUSFSPA and the McCarty decision. Section 5124 contemplates persons such as wife here should be entitled to the same protections as those persons whose judgments of dissolution did not become final

during that same period.

"Here, no subtle balance is required for the legislative intent is patent, clear, explicit, and the state's 'paramount interest' in the equitable distribution of marital property upon dissolution of marriage points to section 5124 as proper exercise of the police power. Finally, such a curative type of legislation supplements and carries into effect the Congressional intent of FUSFSPA (10 U.S.C. Section 1408(a)(2)) to 'abrogate all applications of the McCarty decision.' We hold that section 5124 authorizes the modification of the final judgment here to include a division of military retirement benefits." (Id., at pp. 608-609; footnote omitted.)

Wife suggests that we conclude the trial court was without authority to enter its order at the time it was made but also conclude that section 5124 now authorizes such an order, we should affirm the order in the

interest of judicial economy because an identical order would result upon a reversal. She cites Corkland v. Boscoe (1984) 156 Cal. App.3d 989 in support of her position. In Corkland, the Court of Appeal concluded that a trial court had been without authority to grant a motion compelling performance of a settlement agreement because the court's order preceded the effective date of Code of Civil Procedure section 664.6 which later authorized such an order. Recognizing that a reversal would result in an identical order on remand, the Court of Appeal affirmed the trial court's ruling in the interest of judicial economy.

We believe that the rationale for affirmance in Corkland is equally applicable here. No useful purpose would be served by reversing the order before us simply to have the matter return to the trial court for entry of a new order to the same effect. Accordingly, we affirm the order modifying the judgment.

IV. Wife's Request for Sanctions

Wife requests that we impose sanctions on husband, suggestion that he has delayed resolution of this appeal so that, in the event we reverse the trial court's order, there will be insufficient time for her to seek modification of the judgment before section 5124 expires on January 1, 1986. She contends that even if the issues raised by husband had some arguable basis at the time the appeal was filed, the enactment of section 5124 eliminated any continuing basis for the appeal and rendered the appeal frivolous. We decline to conclude that husband has brought or continued his appeal in bad faith such as would justify imposition of sanctions.

Sabraw, J.

WE CONCUR:

Anderson, P.J.

Poche, J.

FOOTNOTES

1. Unless otherwise indicated, all further statutory references are to the Civil Code.

2. 10 United States Code section 1408(c)(1) provides: "Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981 either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."

As enacted, 10 United States Code section 1408(d)(1) provided: "...the Secretary shall...make payments to the spouse or former spouse in the amount of the disposable retired or retainer pay of the member specifically provided for in the court order..."

Section 106(a) of FUSFSPA provided: "The amendments made by this title shall take effect on the first day of the first month

which begins more than one hundred and twenty days after the date of the enactment of this title." (Thus, February 1, 1983, is the effective date of implementation of the Act.)

That the purpose of the legislation was to reverse McCarty is clear. "The [Act] would permit disposable military retired pay to be considered as property... This provision in [the Act] would have the effect of reversing the decision of the United States Supreme Court in the case of McCarty v. McCarty..." (Report on conferees, see Congressional Record H5999 (daily ed. 8/16/82).)

3. Section 5124 provides:

"(a) Community property settlements, judgments, or decrees that became final on or after June 25, 1981, and before February 1, 1983, may be modified to include a division of military retirement benefits payable on or after February 1, 1983, in a manner consistent with federal law and the law of this state as it existed before June 26, 1981, and

as it has existed since February 1, 1983.

"(b) Modification of community property settlements, judgments, or decree under this section may be granted whether or not the property settlement, judgment, or decree expressly reserved the pension issue for further determination, omitted any reference to a military pension, or assumed in any manner, implicitly or otherwise, that a pension divisible as community property before June 25, 1981, and on or after February 1, 1983, was not as of the date the property settlement, judgment, or decree became final, divisible community property.

"(c) Any proceeding brought pursuant to this section shall be brought before January 1, 1986.

"(d) This section shall remain in effect only until January 1, 1986, and on that date is repealed unless a later enacted statute which is chaptered before that date deletes or extends that date."

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Filed August 28, 1981
Renee C. Davidson, County Clerk
By Kathy McKean, Deputy

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

In re the Marriage of:

Petitioner: JOAN E. THOMPSON

Respondent: ROBERT M. THOMPSON

INTERLOCUTORY JUDGMENT OF
DISSOLUTION OF MARRIAGE

1. This proceeding came on for default or uncontested hearing as follows:

a. Date: August 28, 1981, Dept. 33

b. Judge: Richard A. Hodge

c. Petitioner was present in Court. Petitioner's attorney, D. Ronald Hyde was present in Court.

2. The court acquired jurisdiction of the respondent on February 25, 1981 and

Respondent was served with process.

3. THE COURT ORDERS

a. An interlocutory judgment be entered and the parties are entitled to have their marriage dissolved.

b. After six months from the date the court acquired jurisdiction of the respondent, a final judgment of dissolution may be entered upon proper application of either party or on the court's own motion unless a dismissal signed by both parties is filed. The final judgment shall include such other and further relief as may be necessary to a complete disposition of this proceeding but entry of the final judgment shall not deprive this court of its jurisdiction over any matter expressly reserved to it in this or the final judgment until a final disposition is made of each such matter.

c. Jurisdiction is reserved to make such other and further orders as may be necessary to carry out the provisions of this

judgment.

4. THE COURT FURTHER ORDERS:

1. That Respondent shall pay to Petitioner as and for spousal support, the sum of $1,000.00 per month, payable on the first of each month, commencing 9/1/81, and continuing each and every month thereafter in like manner unless sooner terminated by the death of Petitioner, remarriage of Petitioner, or until further order of the court.

As a further incident of support, the Respondent shall name the Petitioner as irrevocable beneficiary on his two New York Life Insurance Co. policies with a minimum death benefit, to the Petitioner of $60,000.00.

2. That the six (6) acres of undeveloped land in Rescue, Eldorado County, California, shall be placed for sale at the highest fair market value and the net proceeds shall be divided equally between the parties. Both parties are ordered to cooper-

ate in the sale of said property. The Court specifically reserves judgment over both the sale of the property and the distribution of the assets therefrom.

3. IT IS FURTHER ORDERED that the Petitioner be awarded, as her sole and separate property, the following items:

a. Furniture, furnishings and effects in her possession.

b. The bank accounts and savings accounts in her possession.

c. The rolltop desk, grandmother clock and four posted white bed, currently in storage in Sacramento, California.

1. The Respondent shall excercise due diligence within a reasonable time from the date of this Interlocutory decree to insure that the Petitioner shall receive the items above mentioned in storage.

d. The following items currently in the possession of the Respondent in Turkey:

1. Books belonging to Petitioner

2. Brass Lanterns

3. Brass tray

4. Bronze ware

5. English Gold Mirror

6. Half Cooking Equipment (muffin pans, cookie sheets, etc.)

7. Microwave

8. Oil paintings

9. Small oval oil painting

10. Spanish desk

11. Wicker chairs and table

12. Toll painting

13. Photograph album containing baby pictures of the Petitioner, wedding pictures and pictures of the parties' children.

The Respondent is ordered to return said items to the Petitioner within a reasonable time from the date of this Interlocutory decree.

e. 1974 Lincoln Continental automobile.

f. 1979 24 ft. Travel Trailer, subject

to a credit to the Respondent of $1,800.00 from the sale of the above land.

4. IT IS FURTHER ORDERED that Respondent be awarded, as his sole and separate property, the following items:

a. Furniture, furnishings and effects in his possession, save and except those items set forth above which were given to the Petitioner.

b. His life insurance policies provided he name the Petitioner as irrevocable beneficiary in the amount set forth above and maintain said policies in full force and effect at the current level of coverage.

c. The savings and checking accounts in his name.

d. His military retirement benefits through his place of employment, pursuant to McCarty v. McCarty--U.S.--81 Daily Journal D.A.R. 2009, (198)

e. The 1979 Chevrolet Chevette automobile.

5. IT IS FURTHER ORDERED THAT Petitioner and Respondent execute any and all documents necessary to carry out the intent and provisions of any order contained herein. The Court specifically reserves jurisdiction over the parties and the division of assets as set forth above to insure compliance.

6. It is understood by and between the parties that the Respondent is desirous of obtaining an early Final decree in these proceedings and that upon entry of said Final decree that the Petitioner shall lose all right and privilege as to receiving medical coverage and services as a result of her being a dependent of a military personnel. It is further understood by and between the parties that Petitioner is in immediate need of medical treatment and it is agreed that it shall be the order of the Court that should the Final decree be entered prior to the time that the medical treatment currently being received by Petitioner is complete, that the

Respondent shall bear all expenses relative to her present medical condition and for all medical treatment received by the Petitioner in the private medical sector, and shall further hold the Petitioner free and harmless for said condition therefrom.

7. IT IS FURTHER ORDERED that Respondent shall pay as and for attorneys fees and costs on account of Petitioner, the sum of $500.00. Said sum is to be paid from the net proceeds of the Respondent from the sale of the property in Eldorado County, California, above mentioned.

Dated: August 28, 1981

s/Judge of the Superior Court

Approved as to form and content and signed August 27, 1981

s/ Joan E. Thompson, Petitioner

s/ D. Ronald Hyde, Attorney for Petitioner

Approved as to form and content and signed August 21, 1981.

s/Robert M. Thompson, Respondent

s/ Wm. Neal Shepherd, Attorney for Respondent

FILED - CALIFORNIA SUPREME COURT
June 10, 1986

FILED - COURT OF APPEAL OF THE
STATE OF CALIFORNIA
CIVIL NO. June 10, 1986

IN THE
Supreme Court
OF THE
State of California

In re the Marriage of Thompson

JOAN E. THOMPSON,
Respondent,

v.

ROBERT M. THOMPSON,
Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

On Appeal from the Judgment of the Superior Court of the State of California, in and for the County of Alameda

---

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Attorneys for Appellant

Notice is hereby given that ROBERT M. THOMPSON, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the California Supreme Court denying appellant's Petition for Review entered in this action on March 12, 1986.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, sub-paragraph (2).

Dated: June 10, 1986

RESPECTFULLY SUBMITTED,

GALE, SEIBEL & INDERBITZEN

By: /s/
Brian D. Seibel

STATEMENT OF APPLICABILITY

Appellant hereby states that 28 U.S.C., Section 2403(b) may be applicable to the proceedings herein and that this jurisdictional statement shall be served on the Attorney General of the State of California in conformity with Rule 28.3.

Supreme Court, U.S.
FILED
AUG 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-122

In The
Supreme Court of the United States
October Term, 1986

ROBERT M. THOMPSON,

Appellant,

v.

JOAN E. THOMPSON,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

MOTION OF APPELLEE JOAN E. THOMPSON TO DISMISS [or AFFIRM]

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10 U.S.C. Section 1408 1

Appellee, JOAN E. THOMPSON, hereby moves to dismiss [and/or affirm] the within appeal on the grounds that it does not present a substantial Federal question; that the Federal question sought to be reviewed was not timely and properly raised in the Court below; and that the questions presented are so unsubstantial as not to need further argument.

———o———

STATEMENT OF FACTS

The parties to this appeal were married on Christmas day in 1955. A final judgment of dissolution of that marriage was entered in California on August 28, 1981. That final judgment awarded Appellant's military pension to him as his sole and separate property, pursuant to this Court's decision in *McCarty v. McCarty* (1981) 453 U.S. 210. The Interlocutory Judgment of Dissolution of Marriage specifically provided that "the Court specifically reserves jurisdiction over the parties and the division of assets as set forth above to ensure compliance". The *McCarty* decision was issued approximately two months prior to the entry of the final judgment of dissolution in this action.

Thereafter, Congress passed the Federal Uniformed Services Former Spouses Protection Act ("FUSFSPA"; 10 U.S.C. Section 1408) which became effective February 1, 1983. Three days after the effective date of FUSFSPA, Appellee filed a Notice of Motion for Modification in the trial court, seeking an order giving her the benefits of FUSFSPA by modifying the decree of dissolution to provide that Appellant's military retirement was a community

property interest. The formal order granting Appellee's motion for modification in the trial court was filed and entered July 1, 1983.

California Civil Code Section 5124 (hereafter referred to as "Section 5124") became effective on January 1, 1984.

———o———

ARGUMENT

1. APPELLANT FAILED TO PROPERLY RAISE THE QUESTION OF WHETHER SECTION 5124 VIOLATES THE FEDERAL CONSTITUTION.

In his Opening Brief to the California Court of Appeal, Appellant failed to assert the position which he currently takes before this Court, i.e. that Section 5124 amounts to an impairment of contract in violation of Article I, Section 10 of the United States Constitution and/or amounts to a denial of due process under the Fifth Amendment to the United States Constitution.

Although that Opening Brief was filed more than five months after the effective date of Section 5124, Appellant declined to even mention the existence of Section 5124 in his Opening Brief, much less assert that it was unconstitutional. Before that Opening Brief was filed, a California Court of Appeals decision holding Section 5124 to be constitutional was published. *Mueller v. Walker*, 167 Cal.App.3d 600.

Since Appellant elected to forego any discussion of Section 5124 in his Opening Brief on Appeal and, specifical-

ly, failed to assert or discuss the constitutionality of that statute, both the California Courts and this Court would be justified in simply ignoring Appellant's eleventh hour arguments regarding the constitutionality of that statute.

2. THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED BY THIS APPEAL SINCE THE STATUTE UNDER ATTACK BY APPELLANT NO LONGER EXISTS.

Section 5124 expired by its own terms on January 1, 1986. Both the language of the statute on its face and the cases interpreting it indicate clearly that the statute was designed to prevent the inequity of treating those spouses whose dissolution decrees became final in California between the effective date of the *McCarty* decision (June 26, 1981) and the effective date of FUSFSPA (February 1, 1983) differently than those military spouses whose dissolution decree became final before *McCarty* and after FUSFSPA.

Since Section 5124 was in existence for only two years and since it was repealed by its own terms January 1, 1986, neither the statute itself nor any decisions by this Court (or any other court) or its constitutionality will have any prospective effect on any litigants.

Although the instant case cannot be characterized as "moot" as between Appellant and Appellee here, the fact that Section 5124 has been repealed by its own terms eliminates any general interest or importance in its constitutionality.

3. NEITHER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT NOR ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION ARE VIOLATED BY SECTION 5124.

Appellant asserts that Section 5124 violates the due process clause of the Fifth Amendment of the Constitution of the United States in that it violates the principles of res judicata by providing that a final judgment can be reopened to provide for the equitable distribution of marital property upon dissolution of the marriage.

> Absent an indication of any purpose upon the part of the state authority (whether legislative or judicial) to evade some prior decision of the United States Supreme Court or federal Congress, the principles of finality protecting the parties to this litigation (res judicata or collateral estoppel) are, within the broad limits of fundamental fairness, solely the concern of state law. (*Konigsberg v. State Bar of California,* 366 U.S. 36, 44 . . .)

Mueller v. Walker, 167 Cal.App.3d at p. 607

By making Civil Code Section 5124 retroactive, the California legislature was simply modifying its own res judicata rules to serve the state's overriding public interest in the equitable distribution of marital property upon dissolution of marriage. This is exactly what congress intended to allow the states to do by the passage of FUSFSPA. In Re *Marriage of McDonough* (1986) 183 Cal.App.3d 45, 227 Cal.Rptr. 872.

The California Court of Appeal succinctly dealt with the same due process argument as is advanced by Appellant here in the case of *Mueller v. Walker,* 167 Cal.App.3d 600, 608, 609 where it said:

> In determining whether Civil Code Section 5124 contravenes the due process clause, we must consider inter alia the significance of the state interest served and the importance of retroactive application to effectuate that interest . . . .
>
> We conclude the language of this section as well as its legislative history [footnote omitted] leave no doubt that any property divisions made in reliance upon the *McCarty* decision which became final before the effective date of FUSFSPA are susceptible to redivision as community property so long as action is taken before the scheduled repeal date. This law is a clear expression of legislative intent that recovery of a community property interest in a military pension benefit should not be barred simply because the case by chance falls into the 18-month gap between the effective dates of FUSFSPA and the *McCarty* decision. Section 5124 contemplates persons such as wife here should be entitled to the same protections as those persons whose judgments of dissolution did not become final during that same period.

It is equally clear that Section 5124 does not amount to an impairment of contract in violation of Article I, Section 10 of the Constitution of the United States. The first problem with Appellant's argument in this regard is that Appellant erroneously categorizes the Judgment from which he has appealed as a "contract." The mere fact that the parties may have entered into stipulations in the course of the litigation which led to the judgment does not transform the judgment itself into a contract.

Altogether different standards would apply to the issue of whether the parties to an agreement should be allowed to rescind the agreement or be relieved by the courts from particular terms thereof and on grounds of mistake, surprise or public policy.

But we are dealing here with a judgment, not a contract. Once litigation results in a judgment, the guidelines for modification of that judgment are not the same as would be used to modify the terms of a contract between the parties. Furthermore, the standards used to modify a judgment should not be affected by the fact that the parties to the litigation may have arrived at certain agreements during the course of the litigation. This is especially true where, as here, the court rendering the judgment in a dissolution action specifically reserved jurisdiction over the parties and the division of their assets.

Assuming, arguendo, that the judgment in this action was transformed into a contract between the parties, and that Section 5124 constitutes an impairment of that contract, the fact remains that not every impairment of a contract is unconstitutional. *Home Building and Loan Assoc. v. Blaisdell,* 290 U.S. 398. Whether the impairment is a prohibited one depends on an examination of the nature and purpose of the legislative action which results in the impairment. If the justification is sufficiently compelling, the impairment is not constitutionally prohibited.

———o———

CONCLUSION

The Court should not take jurisdiction of this appeal.

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-122

In The
Supreme Court of the United States
October Term, 1986

IN RE THE MARRIAGE OF THOMPSON

ROBERT M. THOMPSON,

Appellant,

v.

JOAN E. THOMPSON,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

OPPOSITION TO MOTION OF APPELLEE JOAN M. THOMPSON TO DISMISS

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Appellant ROBERT M. THOMPSON files the following opposition to motion of Appellee JOAN E. THOMPSON to dismiss the within appeal on the grounds that the Federal question sought to be reviewed was not timely and properly raised in the Court below.

———o———

STATEMENT OF FACTS

Appellee's motion to reallocate Appellant's military retirement benefits was heard, argued, briefed and the trial court took it under submission on April 20, 1983. On May 27, 1983 the trial court granted Appellee's motion to reallocate Appellant's military retirement benefits. Appellant timely filed his notice of appeal to the California Court of Appeal on July 25, 1983. California Civil Code Section 5124 did not become law until January 1, 1984. For this very obvious reason the applicability of California Civil Code Section 5124 and the ancillary issues, i.e., whether such Code Section violated the contract clause, Article 1, Section 10 of the United States Constitution and whether the Code Section as application to this particular case violated the due process clause of the Fifth Amendment to the United States Constitution were not raised in the trial court. Because these issues were not raised in the trial court they were not argued in Appellant's opening brief. These issues were first raised in Respondent's opening brief in the California Court of Appeal where for the first time Appellee argued that California Civil Code Section 5124 was dispositive of the issues raised in the trial court. These issues were addressed in response by Appellant in his closing brief filed with the California

Court of Appeal on July 19, 1985. These issues were further argued at length before the California Court of Appeal in oral argument. The California Court of Appeal in its decision selectively discussed only the due process issue without addressing the impairment of contract argument raised by Appellant. Appellant, in response to Respondent's opening brief in the California Court of Appeal raised the further issue that Civil Code Section 5124 was not applicable to this case in that California Civil Code Section 5124 did not become law until over seven months after the date of the trial court's decision herein. The California Court of Appeal explicitly recognized that absentee passage of California Civil Code Section 5124, the trial court was without authority to modify the judgment as it did. Thus, Appellee's argument that the question of the constitutionality of California Civil Code Section 5124 was not properly raised in the Court of Appeal is specious. The applicability of California Civil Code Section 5124 was never raised by Appellee at the trial court level and was raised for the first time on appeal by Appellee in the California Court of Appeal. In response to Appellee's assertion that California Civil Code Section 5124 was dispositive of the issues raised on appeal, Appellant argued that said code section was unconstitutional on the grounds stated in Appellant's appeal to this court. To categorize Appellant's raising of these issues as "eleventh hour arguments" as Appellee does in her motion to dismiss simply ignores the chronology of the effective dates of the applicable law herein. The California courts were not justified in simply ignoring Appellant's arguments.

CONCLUSION

The Court should deny the motion of Appellee to dismiss [or affirm] this appeal.

Respectfully submitted,

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